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Tan Swee You v Sahiron bin Mohd Yunus & Anor

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HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO LBN-24NCC-1/8 OF 2020
LEONARD SHIM JC
11 AUGUST 2021

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Civil Procedure — Preliminary objection — Multiplicity of proceedings — Plaintiff had earlier filed writ action in sessions court — Whether application was frivolous, scandalous, vexatious, abuse of court process — Whether defendants were prejudiced or sustained miscarriage of justice — Whether causes of action and reliefs were materially different — Whether application should be consolidated — Rules of Court 2012 O 4 r 1

D

Companies and Corporations — Meetings — Calling of meetings — Plaintiff applied for order to convene meeting — Whether impracticable for meeting to be called in ordinary ways — Whether notice of extraordinary general meeting given — Companies Act 2016 s 314

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The plaintiff filed an application by way of originating summons ('the OS') for an order, among others, to convene a company meeting for Triple Galaxy Engineering Sdn Bhd ('the company') and for one member of the company present to be deemed to constitute a quorum. Prior to the filing of the OS, the company had called for an extraordinary general meeting ('EGM') on 16 August 2018 for the directors of the company, the plaintiff and the defendants to sign the audited financial statements for the year 2016 and 2017 but the defendants had failed to show up at the EGM to sign the audited financial statements. The company once again called for a members' meeting on 14 July 2020 but the defendants were absent. As such, the company had failed to submit the signed audited financial statements and this had caused the company to be penalised by the Lembaga Hasil Dalam Negeri ('LHDN'). The defendants had raised preliminary objections based on the following grounds: (a) the plaintiff had earlier on filed a writ action in Suit No LBN-A52–3/9 of 2019, in the sessions court ('the sessions court suit'); (b) the plaintiff's OS was a second bite on the same cherry and it was frivolous, scandalous, vexatious, an abuse of the process of court and a multiplicity of proceedings; and (c) the OS ought to be struck out and/or stayed and/or consolidated with the sessions court suit.

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Held, allowing the application with costs:

(1) A comparison of the cause papers filed in the sessions court suit and in the OS showed that the facts, parties, causes of action and reliefs sought were materially different. They were not identical as contended by the defendants. The causes of action and reliefs sought by the plaintiff in the sessions court suit were essentially for specific performance of director's duties to sign the audited accounts and financial statements for 2016 and 2017, claims for monies for personal loans and damages for loss and damage arising from breach of fiduciary duties. The main defences or issues raised in the defence and counterclaim in the sessions court suit included fraudulent and untrue accounts, declaration on removal of directors, delivery of original share certificates, monetary claims for the purchase of shares in the plaintiff company. However, the relief sought in the OS by the plaintiff was a statutory remedy or relief under s 314 of the Companies Act 2016 (previously s 150 of the Companies Act 1965) to hold a meeting of the company within 14 days from the date of the order and for one member present or by proxy to be deemed to constitute a quorum. Hence, there was no duplicity or multiplicity of proceedings or identical issues as alleged or at all and the exercise of a right or seeking a statutory relief afforded under ss 150 and 314 of the Companies Act 2016 in the circumstances of the case could not regarded as frivolous, scandalous, vexatious or an abuse of process of the court (see paras 16–19).

(2) There was insufficient evidence adduced by the defendants to show that the plaintiff was having a second bite of the cherry by making this application under s 150 of the Companies Act 1965 and s 314 of the Companies Act 2016 as alleged. As there were no common question of law or fact of sufficient importance to render it desirable that the sessions court suit and this OS should be disposed of at the same time, the requirements for consolidation under O 4 r 1 of the Rules of Court 2012 ('the ROC 2012') was not satisfied (see paras 21–22).

(3) There was no explanation by the defendants for their failure to attend the EGM convened on 2 November 2020. Their non-attendance resulted in a quorum failure and made the calling of the EGM futile and rendered it impractical to carry on the affairs of the plaintiff's company. The defendants were aware that the plaintiff had been penalised by LHDN for failure to submit the audited accounts and was likely to face more penal sanction if the affairs of the plaintiff was not properly carried out as required by the Companies Act 2016 and the Income Tax Act 1967. The body of evidence adduced before the court indicated that there was an intentional uncooperative attitude on the part of the defendants and/or deliberated non-attendance of the EGM and a persistent effort to derail the EGM after proper notice had been issued (see paras 49 & 51).

[Bahasa Malaysia summary

Plaintif memfailkan permohonan melalui saman pemula ('SP') untuk satu perintah, antaranya, untuk mengadakan mesyuarat syarikat bagi Triple Galaxy Engineering Sdn Bhd ('syarikat tersebut') dan untuk satu ahli syarikat tersebut membentuk satu kuorum. Sebelum pemfailan SP, syarikat tersebut telah mengadakan satu mesyuarat agung luar biasa ('EGM') pada 16 Ogos 2018 untuk pengarah-pengarah syarikat tersebut, plaintif dan defendan-defendan untuk menandatangani penyataan-penyataan kewangan yang telah diaudit untuk tahun 2016 dan 2017 tetapi defendan-defendan telah gagal untuk hadir ke EGM bagi menandatangani penyataan-penyataan kewangan yang telah diaudit. Syarikat tersebut telah sekali lagi mengadakan mesyuarat ahli-ahli pada 14 Julai 2020 tetapi defendan-defendan tidak hadir. Oleh itu, syarikat tersebut telah gagal untuk menghantar penyataan-penyataan kewangan yang telah diaudit dan ini telah menyebabkan syarikat tersebut dikenakan penalti oleh Lembaga Hasil Dalam Negeri ('LHDN'). Defendan-defendan telah membangkitkan bantahan-bantahan awal berdasarkan sebab-sebab berikut: (a) plaintif telah sebelum ini memfailkan tindakan writ di Guaman No LBN-A52–3/9 Tahun 2019, di dalam mahkamah sesyen ('saman mahkamah sesyen'); (b) SP plaintif adalah cubaan kedua dan ia adalah meremehkan, mengdatangkan skandal, menyusahkan dan menyalahgunakan proses mahkamah, dan gandaan prosiding-prosiding; dan (c) SP perlu dibatalkan dan/atau dibiarkan sementara dan/atau digabungkan dengan saman mahkamah sesyen.

Keputusan, membenarkan pemohonan dengan kos:

(1) Perbandingan kertas-kertas kausa difailkan di saman mahkamah sesyen dan di dalam SP yang menunjukkan bahawa fakta-fakta, pihak-pihak, sebab-sebab tindakan dan relif-relif yang diminta adalah sangat berbeza. Ia tidak sama seperti yang dikatakan oleh defendan-defendan. Sebab-sebab tindakan dan relif-relif yang diminta oleh plaintif di dalam saman mahkamah sesyen adalah pada asasnya untuk perlaksanaan spesifik atas tugas-tugas pengarah untuk menandatangani akaun-akaun yang diaudit dan penyataan-penyataan kewangan untuk 2016 dan 2017, tuntutan-tuntutan untuk wang bagi pinjaman-pinjaman peribadi dan kerugian daripada perlanggaran tugasan fidusiari. Pembelaan-pembelaan yang utama atau isu-isu yang dibangkitkan di dalam pembelaan dan tuntutan balas di dalam saman mahkamah sesyen termasuklah akaun-akuan penipuan dan tidak benar, deklarasi atas penyingkiran pengarah-pengarah, penghantaran sijil-sijil asal saham, tuntutan wang untuk pembelian saham-saham di dalam syarikat plaintif. Walau bagaimanapun, relif yang diminta di dalam SP oleh plaintif adalah remedi statutori ataupun relif di bawah s 314 Akta Syarikat 2016 (sebelum ini adalah s 150 Akta Syarikat 1965) untuk mengadakan mesyuarat syarikat dalam masa 14 hari dari tarikh perintah dan untuk

satu ahli hadir ataupun melalui wakil untuk dikatakan mencukupi kuorum. Oleh itu, tidak terdapat penduaan atau gandaan prosiding-prosiding atau isu-isu serupa sepertimana yang dikatakan atau sama sekali dan perlaksanaan hak atau mencari relif statutori sepertimana yang terdapat di ss 150 dan 314 Akta Syarikat 2016 dalam keadaan kes tidak boleh dianggap sebagai meremehkan, mendatangkan skandal, menyusahkan dan menyalahgunakan proses mahkamah (lihat perenggan 16–19).

(2) Terdapat kekurangan keterangan yang dikemukakan oleh defendan-defendan untuk menunjukkan bahawa plaintif telah membuat cubaan kedua dengan membuat permohonan di bawah s 150 Akta Syarikat 1965 dan s 314 Akta Syarikat 2016 seperti yang dikatakan. Memandangkan tiada persoalan undang-undang yang sama atau fakta yang penting untuk menarik minat saman mahkamah sesyen dan saman pemula ini patut dibuang pada masa yang sama, keperluan-keperluan untuk penggabungan di bawah A 4 k 1 Kaedah-Kaedah Mahkamah Tinggi 2012 tidak dipenuhi (lihat perenggan 21–22).

(3) Tidak terdapat penjelasan oleh defendan-defendan untuk ketidakhadiran mereka pada EGM yang diadakan pada 2 November 2020. Ketidakhadiran mereka membuatkan kuorum tidak cukup dan menyebabkan panggilan untuk EGM telah gagal dan membuatkan ia tidak praktikal untuk diteruskan atas urusan-urusan syarikat plaintif. Defendan-defendan mempunyai pengetahuan bahawa plaintif telah dikenakan penalti oleh LHDN bagi kegagalan untuk menghantar akaun-akaun yang telah diaudit dan kemungkinan besar akan menghadapi lebih sekatan penalti jika urusan-urusan plaintif tidak dijalankan dengan betul seperti yang diperlukan oleh Akta Syarikat 2016 dan Akta Cukai Pendapatan. Keseluruhan keterangan yang dikemukakan ke mahkamah memberikan indikasi bahawa terdapat sikap tidak memberikan kerjasama yang disengajakan oleh defendan-defendan dan/atau ketidakhadiran di EGM dan usahan berterusan untuk menangguhkan EGM setelah notis yang sewajarnya telah dikeluarkan (lihat perenggan 49 & 51).]

Cases referred to

Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244; [1978] 1 LNS 20, FC (refd)

Del E Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd [1973] 1 MLJ 31b (refd)

El Sombrero Ltd, In re [1958] Ch 900, Ch D (refd)

Golden Plus Holdings Bhd v Teo Kim Hui & Ors [2021] 7 MLJ 852; [2020] 1 LNS 851, HC (refd)

Horwood v Statesman Publishing Co, Ltd and Others Childs v Same [1929] All ER Rep 554, CA (refd)

Leong Ah Hong v Hup Seng Co Ltd [1963] 1 MLJ 164 (refd)
Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors [2014] MLJU 267; [2014] 1 LNS 236, HC (refd)
Phuar Kong Seng v Lim Hua [2005] 2 MLJ 338, HC (refd)
Soh Chee Gee v Syn Tai Hung Trading Sdn Bhd [2019] 2 MLJ 379; [2019] 6 CLJ 516, CA (refd)
Tamabina Sdn Bhd & Anor v Nakamichi Corporation Berhad [2016] MLJU 462, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 150
Companies Act 2016 ss 57(4), 58(1)(6), 71(1), 136(1), 150, 213, 214, 310, 314
Income Tax Act 1967
Rules of Court 2012 O 4 r 1, O 18 r 19, O 92 r 4

Darren Tay (Collin Goonting & Assoc) for the plaintiff.
Rakhbir Singh (Rakhbir Singh & Co) for the defendants.

Leonard David Shim JC:

[1] Enclosure 1 is the plaintiff's application for the following orders:

(a) that a meeting of Triple Galaxy Engineering Sdn Bhd (company No 1061185-W) be called within fourteen days from the order of this honourable court or at such date and time as this honourable court shall order;

(b) that one member of Triple Galaxy Engineering Sdn Bhd (company No 1061185-W) present in person or in proxy shall be deemed to constitute a quorum; and

(c) such further and/or other relief deemed fit and proper by this honourable court.

[2] The grounds of this application are as follows:

(a) prior to the filing of this originating summons, Triple Galaxy Engineering (company No 1061185-W) ('the company') had called for an extraordinary general meeting ('the EGM') on 16 August 2018 for the directors of the company, the plaintiff and the defendants to sign the audited financial statements for year 2016 and 2017;

(b) the defendants had failed to show up at the EGM to sign the audited financial statements for year 2016 and 2017;

(c) the company once again on 14 July 2020 called for a members' meeting of which the defendants were absent;

(d) due to the defendants' absence in both meetings, the audited financial statements for year 2016 and 2017 remain unsigned; and

(e) failure by the company to submit the signed audited financial statements for year 2016 and 2017 has caused the company and the plaintiff to be penalised by Lembaga Hasil Dalam Negeri (LHDN).

[3] Enclosure 9 is the defendant's application for an extension of time to file their affidavit in opposition. Prior to the hearing of encl 9, the plaintiff had indicated that they have no objection to the extension of time sought by the defendants. In their written submission (encl 30), the defendants submitted that encl 9 is no longer relevant because parties have agreed for the extension of time to file and serve the affidavit in opposition and affidavit in reply amicably. In the circumstances, encl 9 is struck out with no order as to costs.

THE DEFENDANTS' PRELIMINARY OBJECTIONS

[4] The defendants had raised preliminary objections on this originating summons ('the OS') based on the following grounds:

(a) the plaintiff had earlier on filed a writ action in Suit No LBN-A52–3/9 of 2019 (Sc), in the Sessions Court of Labuan ('the sessions court suit').

(b) this plaintiff's originating summons is a second bite on the same cherry and it is:

(i) frivolous;

(ii) scandalous;

(iii) vexatious;

(iv) an abuse of the process of court; and

(v) a multiplicity of proceedings.

(c) this originating summons ought to be struck out and/or stayed and/or consolidated with the sessions court suit.

[5] In order for this court to understand the factual matrix of the sessions court suit, this court has perused the cause papers filed in the Labuan Sessions Court in Suit No LBN-A52–3/9 of 2019 (Sc) which were exhibited in the defendants' affidavit in opposition affirmed by Rotina @ Rostina bt Duli on 24 September 2020 filed herein. In essence, the respective claims and counterclaims in the sessions court suit relates to different issues or reliefs including specific performance of directors duties to sign the audited financial statements, monetary claims for personal loans, the alleged removal of directors, fraudulent and untrue financial statements, delivery of original share certificates and monies paid for the shares in the plaintiff company.

[6] The defendants in the preliminary objections also sought for this originating summons to be struck out and/or be stayed and/or consolidated with the sessions court suit.

[7] The plaintiff submits that if the defendants' position is as such, instead of taking a preliminary objection, the defendants ought to have exercised its rights to do the following:

(a) by filing a striking out application pursuant to O 18 r 19 of the Rules of Court 2012;

(b) by filing a stay application pursuant to O 92 r 4 of the Rules of Court 2012; and

(c) by filing a consolidation application pursuant to O 4 r 1 of the Rules of Court 2012.

[8] The plaintiff went a step further and submitted that this originating summons ought not to be consolidated with the sessions court suit simply because both matters do not meet the basic threshold for consolidation under O 4 r 1 of the Rules of Court 2012.

[9] Order 4 r 1 of the Rules of Court 2012 stipulates:

> Consolidation of causes or matters
>
> (1) Where two or more causes or matters are pending, and if it appears to the court that —
>
> (a) some common question of law or fact arises in both or all of them;
>
> (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) for some other reason it is desirable to make an order under this rule, the court may order the causes or matters to be consolidated on such terms as it thinks just or may order the causes or matters to be tried at the same time or one immediately after another or may order any of the causes or matters to be stayed until after the determination of any other of the causes or matters.

[10] The principles and requirements of consolidating two separate actions have long been set out in the case of *Horwood v Statesman Publishing Co, Ltd and Others Childs v Same* [1929] All ER Rep 554 where Sankey LJ held that:

> I think that an order to consolidate may be made when two or more actions are pending (a) between the same plaintiff and the same defendant; (b) between the same plaintiff and different defendants; (c) between different plaintiffs and the same defendants; and (d) between different plaintiffs and different defendants. The only

limitation which can be placed on Ord 49, r 8, is that there must be some common measure of fact in the two or more cases which it is desired to consolidate.

[11] This requirement was echoed in the case of *Del E Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd* [1973] 1 MLJ 31b, where the court held:

> In these circumstances, the facts that the writs of summons and the statements of claim in the Penang and Kuala Lumpur actions are couched in precisely the same terms and the defence, as discerned in the earlier affidavits before the descent into personalia, would appear to be identical and depend largely on the application of a common set of facts (if the personalia are excluded) to their legal effect on the contract of management assume great significance. Mention is also made of the facts that the same solicitors and counsel act in both cases, and they and the main witnesses are resident in the same place but though these make for convenience and the saving of costs, they are, to my mind, not pertinent. But clearly the examination of the claim and the averments in such of the affidavits I have considered as pertinent to my decision must show that the actions in Kuala Lumpur and in Penang are between the same plaintiffs and substantially the same defendants, though of different legal entities and what is more important involve a common questions of facts.

[12] In *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244; [1978] 1 LNS 20, the Federal Court held:

> The *main purpose of consolidation is to save costs and time,* and therefore it will not usually be ordered unless there is *some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject matter of the actions to render it desirable that the whole should be disposed of at the same time* (*Payne v British Time Recorder Company, Limited, and W W Curtis, Limited* [1921] 2 KB 1; *Horwood v Statesman Publishing Co, Ltd and Others Childs v Same* [1929] All ER Rep 554; *Daws v Daily Sketch & Sunday Graphic Ltd and Another; Darke and Others v Same* [1960] 1 WLR 126; [1960] 1 All ER 397. Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same.

[13] It is the plaintiff's submission that this originating summons and the sessions court suit ought not to be consolidated based on the following grounds:

(a) the plaintiff in this originating summons is Tan Swee You;

(b) the plaintiff in the sessions court suit is Triple Galaxy Engineering Sdn Bhd;

(c) this originating summons was initiated by the plaintiff in his own capacity as the director of Triple Galaxy Engineering Sdn Bhd;

(d) the sessions court suit was initiated by Triple Galaxy Engineering Sdn Bhd in its own capacity;

(e) the causes of action in both originating summons and the sessions court suit are different;

(f) both plaintiffs in this originating summons and the sessions court suit are seeking different claims/remedies against the defendants;

(g) the mode of action in both matters is different ie this is an originating summons while the sessions court suit is a writ of summons;

(h) the prayers sought by the plaintiffs in both matters can only be dealt by the respective courts; and

(i) both matters can be heard and/or decided separately without being stayed or consolidated.

[14] Based on the foregoing reasons, the plaintiff submits that the defendants' preliminary objections have no merits and are without basis and therefore ought to be disregarded by this court.

[15] In any event, the plaintiff contends that the defendants' allegation that this originating summons is 'frivolous, scandalous, vexatious and an abuse of the process of court' was not supported by any concrete evidence. The defendants also did not show that they were prejudiced and/or sustained any miscarriage of justice through this originating summons.

EVALUATION AND FINDINGS ON THE PRELIMINARY OBJECTION

[16] A comparison of the cause papers filed in the sessions court suit and in this OS shows that the facts, parties, causes of action and reliefs sought are materially different. They are not identical as contended by the defendants.

[17] The causes of action and reliefs sought by the plaintiff in the sessions court suit are essentially for specific performance of director's duties to sign the audited accounts and financial statements for 2016 and 2017, claims for monies for personal loans and damages for loss and damage arising from breach of fiduciary duties. The main defences or issues raised in the defence and counterclaim in the sessions court suit includes fraudulent and untrue accounts, declaration on removal of directors, delivery of original share certificates, monetary claims for the purchase of shares in the plaintiff company.

[18] However, the relief sought in this OS by the plaintiff is a statutory remedy or relief under s 314 of the Companies Act 2016 (previously s 150 of

the Companies Act 1965) to hold a meeting of Triple Galaxy Engineering Sdn Bhd within 14 days from the date of this order and for one member present or by proxy to be deemed to constitute a quorum.

[19] Hence, there is no duplicity or multiplicity of proceedings or identical issues as alleged or at all and the exercise of a right or seeking a statutory relief afforded under ss 150 and 314 of the Companies Act 2016 in the circumstances of this case could not regarded as frivolous, scandalous, vexatious or an abuse of process of the court.

[20] It has not been proven that the trial in the sessions court had concluded or a decision after trial has been made. Neither is this court required to decide on the merits of the issues raised in the sessions court as set out in para 17 above and in exhs H2, H4, H6, H8, H10, H11 and H12 of encl 13. These issues will be decided by the sessions court at Labuan. The main issue to be determined in this OS is whether or not it is impracticable for a meeting to be called in ordinary way. An EGM is essentially a meeting of shareholders other than the company's annual general meeting. The plaintiff who is a director and majority shareholder may convene a meeting of members under s 310 of the Companies Act 2016. The plaintiff's right as a substantial shareholder to convene a meeting of members is not dependent on the finding or decision of the sessions court on the issue of the alleged removal of the defendants as directors of the plaintiff. Hence, this court finds that this application brought under s 314 of the Companies Act 2016 is not premature.

[21] There is insufficient evidence adduced by the defendants to show that the plaintiff is having a second bite of the cherry by making this application under s 150 of the Companies Act 1965 and s 314 of the Companies Act 2016 as alleged.

[22] As there are no common question of law or fact of sufficient importance to render it desirable that the sessions court suit and this originating summons should be disposed of at the same time, the requirements for consolidation under O 4 r 1 the ROC 2012 has not been satisfied.

[23] In the premises, this court finds that the defendants' preliminary objection is without merit and is dismissed with costs to be paid by the defendants to the plaintiff. The amount of the costs will be determined below after the merits of this OS has been fully considered.

THE LAW

[24] This originating summons is premised on the powers of the court to convene a meeting of a company pursuant to s 150 of the Companies Act 1965

and s 314 of the Companies Act 2016. A

[25] Section 150 of the Companies Act 1965 reads:

Power of Court to order meeting

If for any reason it is *impracticable to call a meeting in any manner in which meetings may be called* or to conduct the meeting in the manner prescribed by the articles or this Act the Court may, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or of the personal representative of any such member, order a meeting to be called, held and conducted in such manner as the court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting. B C D

[26] Section 314 of the Companies Act 2016 reads:

Power of Court to order meeting

(1) This section applies if *for any reason it is impracticable* — E

(a) to call for a meeting of members of a company in any manner in which meetings of that company may be called; or

(b) to conduct the meeting in the manner prescribed by the constitution of this Act.

(2) The Court may, either of its own motion or on the application — F

(a) of a director of a company;

(b) of a member of the company who would be entitled to vote at the meeting; or

(c) of the personal representative of any such member, order a meeting to be called, held and conducted in any manner the Court thinks fit. G

(3) Where such order is made, the Court may give such ancillary or consequential direction as the Court thinks expedient.

(4) Such directions may include a direction that one member of the company present in person or by proxy at the meeting be deemed to constitute a quorum. H

(5) A meeting called, held and conducted in accordance with an order under this section shall be deemed for all purposes to be a meeting of the company duly called, held and conducted. I

[27] It is pertinent to note that in both sections, the court is equipped with powers to convene a meeting when it is 'impracticable' for a meeting to be called in ordinary ways.

[28] Impracticability will cover a potentially wide range of factual situations, including but not limited to a case where the members have deliberately failed to attend a general meeting so that a proper quorum cannot be constituted. This is because the quorum provisions could not be regarded as conferring a form of veto on a minority party where a situation of deadlock exists.

[29] In *In re El Sombrero Ltd* [1958] Ch 900, it was decided that the test is whether in the particular circumstances of the case the desired meeting of the company could, as a practical matter, be conducted.

[30] As such, the onus is on the plaintiff to satisfy the court that it is impracticable to call a meeting of the company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in any manner prescribed by the articles or the Companies Act. This requirement was set out in the case of *Leong Ah Hong v Hup Seng Co Ltd* [1963] 1 MLJ 164.

[31] These principles were reiterated in *Phuar Kong Seng v Lim Hua* [2005] 2 MLJ 338, where attempts to hold several extraordinary general meetings had failed and as the meetings are inquorate, a deadlock situation had occasioned. In the circumstances, the learned judge held that the company clearly could not function without the intervention of the court and an application pursuant to s 150 was allowed.

[32] The Court of Appeal in *Tamabina Sdn Bhd & Anor v Nakamichi Corporation Berhad* [2016] MLJU 462 held that to show impracticability, it is necessary to show evidence of attempts or efforts to call and hold a meeting and such attempts or efforts had been futile. The reason for the futility in calling or holding a meeting must be attributed to some circumstances that made it almost impossible to hold the meeting. These circumstances could be due to a deadlock situation, an intentional uncooperative attitude of the directors, a persistent effort to derail the meeting or deliberate non-attendance at the meeting after proper and valid notice had been issued.

[33] Based on the authorities above, it can be concluded that the court does not view favourably intervening in a situation and exercising its jurisdiction under the Companies Act unless there is a good reason to do so.

[34] The defendants' in objecting this originating summons had contended that:

(a) the audited accounts and financial statements for year 2016 and 2017 are fraudulent and untrue and are made up by the plaintiff;

(b) the defendants were sacked as directors of the company by the plaintiff; and

(c) no notice of EGM was given by the company to the defendants.

FRAUDULENT AND UNTRUE FINANCIAL STATEMENTS

[35] In rebutting such contention by the defendants, the plaintiff submits that:

(a) the audited accounts and audited financial statements were made based on information available at the plaintiff's office and prepared by a reputable firm of auditors;

(b) the defendants at all material times had access to the same information and were never denied access;

(c) the defendants had never disputed the contents or authenticity of the audited accounts and audited financial statements;

(d) the defendants never questioned the audited accounts and audited financial statements of the previous years ie 2014 and 2015;

(e) the defendants previously had never disclosed the reason for their refusal to sign the audited accounts and audited financial statements; and

(f) the defendants' contention that the audited accounts and audited financial statements are fraudulent and untrue is an afterthought and without basis.

[36] It was also alleged by the defendants that they were sacked by the plaintiff as the directors of the company.

[37] With regards to this issue, the plaintiff submits that:

(a) the plaintiff does not have the capacity to sack the defendants as directors of the plaintiff;

(b) the sacking of a director requires a resolution by the members;

(c) there was no resolution called for the sacking of the defendants;

(d) the latest SSM search shows that the defendants are still the directors of the plaintiff;

(e) the burden of proof is on the defendants to show that they have been sacked as by the plaintiff; and

(f) the defendants have failed to produce any evidence to show their sacking or to discharge themselves from that burden.

A NO NOTICE OF EGM WAS GIVEN

[38] It was also contended by the defendants that no previous notices were given for them to attend any meetings.

B

[39] The plaintiff contends that the plaintiff in the affidavit in support of this application and affidavit in reply had exhibited sufficient evidence to show that notice had been given to the defendants.

C **[40]** The plaintiff further submits that:

(a) the notices of the said EGMs were sent out accordingly by the company secretary;

(b) the said notices were sent to the defendants last known address which
D can be found in the directors' details in the SSM search of the company;

(c) because the notices were sent to the defendants' last known address, it was not the fault of the company secretary as the last known address was registered in the books of the company and also with SSM;

E (d) if the defendants are contending that they are no longer residing in that address, the burden was on the defendants as directors of the company to notify the company secretary or SSM of the change of the new addresses; and

F (e) in other words, the service of the notices on the last known address of the defendants shall be deemed to be good service.

[41] Based on the above, it is clear that the defendants are relying on such grounds to justify their failure and/or refusal to attend the EGM of the
G company. These grounds are according to the plaintiff, afterthoughts which could easily be rebutted by the plaintiff through affidavit evidence.

[42] It is also submitted by the plaintiff that it is clear that the defendants are evasive, non-cooperative and basically intend to stifle the company which
H makes it impossible and impractical for the company to conduct its affairs unless one member can form a quorum to pass resolutions for and on behalf of the company.

EVALUATION AND FINDINGS

I

[43] It is an undisputed fact that the plaintiff is a director and shareholder (69%) of the plaintiff. It is also not disputed that the latest SSM search shows that the defendants are still directors and shareholders (31%) of the plaintiff. The defendants contend that they have been removed or sacked as directors of

the plaintiff. There is no contemporaneous documentary evidence exhibited in defendants' affidavit in opposition (encl 13) to substantiate their bare contention that they have been sacked as directors of the plaintiff. This issue require further inquiry by viva voce evidence and should be determined at the sessions court trial.

[44] The defendants contend that they did not attend the EGM convened on 30 August 2018 and 14 July 2020 due to their alleged non-receipt of the notice of EGM. The affidavit evidence shows that the notice of EGM was sent to the last known address of the defendants at Lot 0021, Tg Kubong, 87000 Labuan and the defendants did not notify the plaintiff or the plaintiff's company secretary that they are no longer occupying or using the said last known address (see exhs TSY5 and TSY6 of encl 2 and exh TSY1 of encl 14). Such notification is required to enable the company secretary to notify the registrar of companies of the change of address pursuant to ss 57(4) and 58(1)(6) of the Companies Act 2016. The latest SSM search shows that the address of the defendant is still at Lot 0021, Tg Kubong, 87000 Labuan (see exh TSY1 of encl 2).

[45] Further, the undisputed affidavit evidence shows that the defendants also did not attend the latest EGM of the plaintiff held on 2 November 2020 despite notice of the EGM having been served on the defendants and their advocates (see exhs TSY1 and TSY2 of encl 23).

[46] The defendants are substantial shareholder (31%) in the plaintiff (see s 136(1) of the Companies Act 2016). The SSM search also shows that the defendants are the majority in number ie two out of three members of the plaintiff's board of directors (see exh TSY1 of encl 2). It is trite that the officers and directors are under a statutory and common law fiduciary duty to act in good faith and in the best interests of the company (see ss 213 and 214 of the Companies Act 2016; *Soh Chee Gee v Syn Tai Hung Trading Sdn Bhd* [2019] 2 MLJ 379; [2019] 6 CLJ 516 (CA) and *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2014] MLJU 267; [2014] 1 LNS 236 (HC)).

[47] If the defendants have good reason to believe they have been removed or terminated from the board of directors of the plaintiff, the defendants should take the necessary steps to update the registrar of companies of the change of directorship. Otherwise, the record of SSM would show their status or position as directors remain unchanged. This court makes no finding on the alleged removal of defendants as directors of the plaintiff.

[48] As substantial shareholders, the defendants have the right to attend, participate, speak and vote at a meeting of the plaintiff company (see s 71(1) of

the Companies Act 2016 and *Golden Plus Holdings Bhd v Teo Kim Hui & Ors* [2021] 7 MLJ 852; [2020] 1 LNS 851 (HC)). Hence, the defendants have the right to attend the previous EGMs or any future meeting that may be convened pursuant to ss 150 and 314 of the Companies Act 2016.

[49] There is no explanation by the defendants for their failure to attend the EGM convened on 2 November 2020. Their non-attendance resulted in a quorum failure and making the calling of the EGM futile and rendering it impractical to carry on the affairs of the plaintiff company.

[50] If the defendants are seriously concerned about their alleged sacking as directors or the alleged fraudulent and untrue financial statements of the plaintiff or to safeguard their rights or interests as substantial shareholders, they should have attended the previous EGM and raise their concerns and issues for deliberation and resolution by the shareholders, directors and/or auditors at the EGM.

[51] Their failure to do so enkindle doubts on the true reason for the defendants' non-attendance at the EGM. The defendants are aware that the plaintiff had been penalised by LHDN for failure to submit the audited accounts for 2016 and 2017 and is likely to face more penal sanction if the affairs of the plaintiff is not properly carried out as required by the Companies Act 2016 and the Income Tax Act 1967. The body of evidence adduced before this court indicates that there is an intentional uncooperative attitude on the part of the defendants and/or deliberate non-attendance of the EGM and a persistent effort to derail the EGM after proper notice had been issued (see exhs TSY1 and TSY2 of encl 23).

[52] From the affidavit evidence, the plaintiff has shown that it is impracticable for the plaintiff to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the constitution or the Companies Act 2016.

[53] Hence, the relief sought in encl 1 is necessary to enable the plaintiff to comply with the legal requirements relating to the conduct of the affairs of the plaintiff company.

CONCLUSION

[54] Based on the aforesaid reasons and subject to para 55 below, the plaintiff's application is allowed in terms of prayers (a), (b) and (c) of encl 1 with costs in the sum of RM6,000 (lump sum) to be paid jointly and severally by the defendants to the plaintiff subject to payment of allocatur fee.

[55] The timeframe for calling or holding the meeting is within 30 days upon the lifting of the Movement Control Order (MCO) instead of 14 days. Notice of the meeting shall be given to all members who are entitled to attend the meeting including the defendants in accordance with the Companies Act 2016.

Application allowed with costs.

Reported by Addibah Adnan